

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:

Unbundled Access to Network Elements

WC Docket No. 04-313

Review of the Section 251 Unbundling  
Obligations of Incumbent Local Exchange  
Carriers

CC Docket No. 01-338

**REPLY COMMENTS OF THE PUERTO RICO TELEPHONE COMPANY**

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## **I. Introduction and Summary**

The Puerto Rico Telephone Company (“PRT”) hereby submits its reply comments in the above-referenced proceeding. The telecommunications market in Puerto Rico shares the vibrant growth in competition that characterizes other markets throughout the country. As with the rest of the United States, consumers in Puerto Rico, whether mass market or enterprise, have enjoyed a rapid expansion in the service options available to them, and this growth shows no signs of slowing.

Puerto Rico is home to a strong facilities-based competitor, which has invested in its own switches and fiber lines, competes aggressively for business customers, and has beaten out PRT to become the default service provider in a number of resort and residential areas. In addition, a number of carriers are either offering VoIP or plan to start such offerings in the near future. Moreover, while national wireless providers have included Puerto Rico in their marketing plans, making these service offerings truly nation-wide in scope, the Puerto Rico market is unique in a number of respects. For example, wireless penetration in Puerto Rico is substantially higher than in most other markets in the United States; in fact, wireless carriers serve *more* lines in Puerto Rico than wireline carriers.

In short, the strongly competitive market in Puerto Rico demonstrates that there are no barriers to facilities-based entry in Puerto Rico, and thus no impairment in switching (for either mass market or enterprise customers), high capacity loops, dedicated transport, or dark fiber. WorldNet’s arguments to the contrary are based on incorrect, incomplete, or outmoded data, and are designed solely to safeguard WorldNet’s access to cheap UNE-P service. The problems and errors in the proceeding that led the Telecommunications Regulatory Board of Puerto Rico (“TRB”) to file a petition with the Commission seeking waiver of the national finding of no impairment in enterprise switching are manifest, and have been well documented in PRT’s

earlier responses to that request. The Commission should accord the doomsday arguments made by WorldNet no weight, and should instead find that when carriers have decided to invest in facilities-based competition in Puerto Rico, they have done so after careful planning and with great and continuing success.

Finally, the FCC should make sure that customers and carriers move promptly away from unlawful unbundling arrangements and toward negotiated, lawful commercial contracts. The Commission does not have the authority to impose temporary or transitional rules that violate the law, and must take action to prevent state public utility commissions from unduly delaying the removal of unlawful obligations.

## **II. Existing Competition in Puerto Rico Makes It Impossible to Find Impairment**

The D.C. Circuit Court of Appeals has “expressed skepticism regarding whether there could be impairment in markets where the element in question—though not literally ubiquitous—is significantly deployed on a competitive basis.”<sup>1</sup> Indeed, because the “touchstone of the Commission’s impairment analysis” is whether there are barriers that “make entry into a market uneconomic,” it follows as a matter of logic that where there is widespread market entry, such entry cannot be uneconomic and impairment cannot exist.<sup>2</sup> Nowhere is this more true than in Puerto Rico.

### **A. Centennial Provides True Facilities-Based Competition**

Many customers in the Commonwealth are served by Centennial, a true facilities-based landline competitor. While PRT cannot determine precisely how many lines Centennial serves, PRT’s best estimate is that Centennial’s customer base includes between 100,000 and 150,000

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<sup>1</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) (“*USTA II*”) (quotations omitted).

<sup>2</sup> *Id.* at 572 (quotations omitted).

enterprise lines. The entire enterprise market in Puerto Rico is about 500,000 lines, which means that Centennial has secured as much as 30 percent of the landline business market in the Commonwealth.

While Centennial's focus has been on the enterprise market, the company has not ignored residential services. Centennial has been able to successfully negotiate service arrangements with new residential and resort developments in Puerto Rico that result in the CLEC being the *de facto* incumbent carrier in these areas. Through these arrangements, Centennial lays the facilities as the development is being constructed, and sets itself up as the default carrier of choice for the residents and owners. In these areas, it is PRT that fight in order to win customers away from Centennial—albeit without TELRIC-priced access to Centennial's facilities.

Centennial's strategy of using its own switches and lines to serve customers is clearly working. The company has installed 4 switches in Puerto Rico, with the last only recently activated. Centennial has also recently begun establishing collocation with PRT in a number of central offices, and has started purchasing T-1 lines from PRT to serve these collocation sites. In short, Centennial shows no signs of slowing its aggressive expansion of its facilities and customer base, and apparently intends to keep investing in Puerto Rico. Put simply, facilities based competition in Puerto Rico is eminently possible, and there are no barriers that make such entry "uneconomic."

## **B. Puerto Rico Enjoys a Unique Level of Intermodal Competition**

The Commission has correctly noted the importance of intermodal competition. In the *Triennial Review Order*, the Commission explained why it is critical to examine all forms of competition in a technologically agnostic way when conducting the impairment analysis:

First, the Act expresses no preference for the technology that carriers should use to compete with the incumbent LECs. Second, we do not want to prejudice market participants' business

decisions about whether to deploy alternative facilities by basing our unbundling rules on the presence or absence of any certain technology. Third, in some instances, the presence of intermodal alternatives can be just as probative of a lack of impairment as the presence of traditional wireline “telephone” deployment. The fact that an entrant has deployed its own facilities – regardless of the technology chosen – may provide evidence that any barriers to entry can be overcome.<sup>3</sup>

The D.C. Circuit agrees, noting with approval that the FCC “expressly stated” that intermodal alternatives “are to be considered when evaluating impairment.”<sup>4</sup> The *USTA II* court went on to “reaffirm *USTA I*’s holding that the Commission cannot ignore intermodal alternatives” when determining impairment.<sup>5</sup>

#### 1. More Than 50 Percent of All Phone Lines In Puerto Rico Are Wireless

In addition to competitive investment in wireline facilities, Puerto Rico has experienced tremendous growth in wireless competition over the past few years. Wireless investment and competition has been so substantial and successful in the Commonwealth that Puerto Rico enjoys a wireless penetration rate that is unique in the country. The most recent figures show that there are 1.4 million wireless lines in Puerto Rico, compared with only 1.2 million wireline lines provided using PRT facilities.<sup>6</sup> The number of CMRS lines in Puerto Rico is thus actually higher than the number of traditional, wireline telephones.

While Americans throughout the country are increasingly using their wireless telephones as their only phones, the Puerto Rico market is particularly far along this path. As Verizon notes in its comments, since the issuance of the *Triennial Review Order* the percentage of people using

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<sup>3</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶ 97 (2003) (“*Triennial Review Order*”).

<sup>4</sup> *USTA II*, 359 F. 3d at 572.

<sup>5</sup> *Id.* at 572-73, citing *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (“*USTA I*”).

<sup>6</sup> This figure includes lines offered by CLECs using resale and UNE-P, but does not include Centennial’s facilities.

wireless telephones as their only phone has increased on a nationwide basis from between 3-5 percent to between 7-8 percent.<sup>7</sup> In the nation as a whole, there are 181 million wireline lines, and 161 million wireless lines.<sup>8</sup> In Puerto Rico, where more than 50 percent of the total telephone lines are wireless, the wireless displacement figure is likely to be substantially higher. As far back as late 2001, the president of Cingular-Puerto Rico commented: “Puerto Rico is one of the most competitive wireless markets in the nation...People feel free to use a cellular phone, often using it more than a regular phone. Some people prefer to just have a cellular phone.”<sup>9</sup>

Moreover, the wireless market in Puerto Rico is not confined to one or two local carriers, but instead consists of no less than 6 different providers. Major mainland CMRS carriers, such as AT&T Wireless, Cingular, Sprint and Verizon Wireless have all integrated Puerto Rico into their national rate plans, and aggressively advertise and compete with one another for business in the Commonwealth. Powerful non-mainland carriers, such as MoviStar (a unit of Telefónica) and Centennial, also compete in the CMRS market in Puerto Rico. Investment is continuing to expand, with a seventh carrier planning to start operations shortly.

In Puerto Rico, with wireless line numbers passing wireline numbers, there can be no question that this level of intermodal competition is at least heavily probative, if not itself determinative. With PRT’s wireline unit now providing service to substantially less than half of the telephones used by customers in the Commonwealth, there is simply no credible way to argue that continued unbundled access to PRT facilities is necessary for competition.

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<sup>7</sup> Verizon Comments at 99.

<sup>8</sup> *Id.*; see also Declaration of Michael K. Hassett and Vincent J. Woodbury in Support of Comments of Verizon, ¶ 51.

<sup>9</sup> Martinez, Jose, “Puerto Rico Flourishes in 2001,” [http://www.sitrends.org/facts/figure.asp?FIGURE\\_ID=63](http://www.sitrends.org/facts/figure.asp?FIGURE_ID=63) (Jan. 2, 2002).

## 2. VoIP Service Is Also Available In Puerto Rico

Increasingly, landline telephone competitors are turning to Voice over Internet Protocol services (“VoIP”) in order to compete for customers. Such services can either be provided by a facilities-based data provider, such as a cable television company, in conjunction with their data offering, or can be provided by independent companies (such as Vonage or AT&T’s Callvantage service) as an ancillary service to customers that already have high-speed Internet access. When offered as an ancillary service, VoIP requires very little in the way of facilities investment by the provider, and can be offered at little marginal expense in new markets around the country.

In Puerto Rico, Liberty Cablevision is launching a VoIP service for its cable subscribers in conjunction with Net2Phone, making VoIP service available to 300,000 homes.<sup>10</sup> Telefónica Larga Distancia (“TLD”) is also planning to make VoIP available in Puerto Rico, selecting Nortel as a vendor.<sup>11</sup> iFreedom Communications has announced plans to provide service using VoIP to small business and residential customers in Puerto Rico.<sup>12</sup> A company called Optivon also markets VoIP services in Puerto Rico.<sup>13</sup> Moreover, because of the low start-up costs involved with VoIP service, companies like Vonage and AT&T could easily begin targeting Puerto Rico if they wished to do so. As the number of VoIP initiatives in Puerto Rico demonstrates, there are no barriers to providing this service anywhere in the country, including the Commonwealth.

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<sup>10</sup> Net2Phone, Liberty to Offer VOIP Service in Puerto Rico, Caribbean Net News, <http://www.caribbeannetnews.com/cgi-bin/Gprint2.pl?file-2004/05/24/voip.htm> (May 24, 2004).

<sup>11</sup> iLocus Industry Update, <http://www.ilocus.com/updateMarch03.htm> (March 3-8 2004).

<sup>12</sup> iFreedom Communications Opens New Markets in Puerto Rico and USVI, Caribbean Net News, <http://www.caribbeannetnews.com/2004/01/30/ifreedom.htm> (January 30, 2004).

<sup>13</sup> <http://www.optivonpr.com/>



### **III. There Is No Evidence of Impairment in Either Enterprise or Mass Market Switching in Puerto Rico**

The rapid competitive growth in Puerto Rico, which includes competitive fiber and switching, wireless facilities, and VoIP, affirmatively demonstrates that there is no impairment with respect to switching for either the enterprise or mass markets. While these facts standing alone compel a finding of no impairment, the record is also devoid of any evidence that would support a contrary conclusion for either mass market or enterprise customers.

The comments of WorldNet Telecommunications (“WorldNet”) provide a wildly inaccurate picture of the state of telecommunications in Puerto Rico.<sup>14</sup> At the most basic level, WorldNet largely ignores the actual evidence of existing competition, described above, and focuses on hypothetical or potential problems in order to make its case for impairment. WorldNet’s comments are based on exaggerated or outdated information, and are narrowly focused on ensuring that WorldNet retains access to below-cost switching as part of UNE-P.<sup>15</sup> WorldNet’s arguments should be afforded no weight.

#### **A. The Board’s Enterprise Waiver Request Was Based on a Flawed Proceeding**

WorldNet bases much of its posturing on the enterprise switching waiver proceeding conducted by the TRB nearly a year ago.<sup>16</sup> As PRT explained in its pleadings responsive to the TRB’s waiver petition, the proceeding conducted by the TRB was deeply flawed and riddled

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<sup>14</sup> Comments of WorldNet Telecommunications (filed Oct. 4, 2004) (“WorldNet Comments”).

<sup>15</sup> WorldNet’s comments are also focused primarily on enterprise switching, which is not surprising given that the company has shown little or no interest in providing residential service.

<sup>16</sup> WorldNet Comments at 1-2.

with mistakes of procedure, law and fact.<sup>17</sup> The errors in the proceeding, and the problems with WorldNet's current arguments, are summarized below.

**B. There Are No Barriers to Competitors Providing Service Using UNE Loops, Cross-Connects, or Collocation**

WorldNet criticizes PRT for having provided few UNE loops, and claims that “as of at least January of this year, not one competitor has successfully obtained a loop as UNE in Puerto Rico.”<sup>18</sup> The insinuation that competitors have been trying and failing to obtain UNE loops is not correct. PRT had not provided UNE loops to its competitors for the simple reason that, until quite recently, its competitors had not asked for them. WorldNet, for example, buoyed by ultra-low cost resale and UNE-P rates, has so far declined to invest in facilities in Puerto Rico, and has elected instead to build a business focusing entirely on using PRT's facilities. Given that the company has been able to capture a substantial share of the market using resale and UNE-P, it is not surprising that WorldNet would avoid any attempt to invest in its own facilities.<sup>19</sup>

PRT should not be penalized for the inevitable fact that CLECs are unlikely to invest in their own facilities if they can rent the facilities of the ILEC at substantially below cost. As the Commission has recognized, “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”<sup>20</sup> The Commission's “primary goal in implementing Section 251 is to advance the

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<sup>17</sup> See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Comments of Puerto Rico Telephone Company, CC Docket No. 01-338 (Jan. 30, 2004) (“PRT Enterprise Switching Comments”); Reply Comments of Puerto Rico Telephone Company (Feb. 13, 2004). For the convenience of the Commission, these documents are attached hereto. PRT believes that the Commission has all of the information it needs to deny the TRB's enterprise switching waiver.

<sup>18</sup> WorldNet Comments at 16.

<sup>19</sup> WorldNet serves approximately 14 percent of the enterprise customers that receive service using facilities owned by PRT.

<sup>20</sup> *TRO*, ¶ 3.

development of *facilities-based competition*.”<sup>21</sup> Moreover, as explained in detail above, competitors such as Centennial and wireless providers have been offering service using facilities that do not require UNE loops, and have been doing so with great success.

WorldNet’s comments have also been overtaken by events. WorldNet rests its arguments on a flawed factual inquiry conducted in haste by the TRB nearly one year ago. In the time since, Centennial *has* begun to complete collocation arrangements and order unbundled loops from PRT.<sup>22</sup> Centennial has completed three collocation arrangements, and has another five pending. Moreover, PRT has successfully provisioned a number of T-1 circuits to Centennial, and stands ready to provide Centennial or any other competitor with both collocation and unbundled loops.

WorldNet also claims that PRT has never provided batch hot cuts, and “does not even have a draft procedure to provide a hot cut.”<sup>23</sup> Because no competitors have sought batch hot cuts, it is correct that PRT has not yet had the opportunity to demonstrate its performance in this area.<sup>24</sup> It is, however, false that PRT does not have a procedure to provide hot cuts. WorldNet raised the issue of a hot cut process briefly in negotiations with PRT, and then quickly dropped

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<sup>21</sup> NPRM, ¶ 2.

<sup>22</sup> WorldNet’s allegation that Centennial’s collocation requests have been pending for three years is also false. Centennial’s requests were submitted, withdrawn, and re-submitted, and then later suffered from construction delays that had nothing to do with PRT. Had the TRB not arbitrarily excluded highly probative evidence on this issue during its proceeding last year, the question of collocation could have been resolved in that forum. PRT Enterprise Switching Comments at 11-13.

<sup>23</sup> WorldNet Comments at 16.

<sup>24</sup> As Verizon observes in its comments, the chances that batch hot cuts will be required any time in the future are shrinking rapidly. CLECs are switching to VoIP technology, which obviates the need for hot cuts. Verizon Comments at 111-112. This is especially true in Puerto Rico, where intermodal competition is *already* the preferred method of offering service. Even as competition in Puerto Rico continues to burgeon, the chance that PRT will be called upon to perform batch hot cuts is very small.

the matter. At the time, PRT developed a draft procedure which remains available for use, and in fact could be used if a CLEC did wish to request.

Further, while PRT has not been asked to provide hot cuts to competitors, the physical work involved in performing a competitive hot cut is not materially different from those that PRT undertakes every day in performing cut-overs for its own customers. Beyond WorldNet's bluster, there is no evidence whatsoever that hot cuts pose a competitive barrier in Puerto Rico.

Finally, FCC should not be drawn into WorldNet's suggestion that just because PRT has not yet provided a service in bulk, it is not making that service available. The *USTA II* court found that the key inquiry is not whether a service is currently being provided by competitors, but rather whether the market "is suitable for competitive supply."<sup>25</sup> The Commission also must take into consideration the competitive experience in other, similar markets.<sup>26</sup> The agency cannot assume, for purposes of the impairment analysis, that a given market is unique, and treat

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<sup>25</sup> *USTA II*, 359 F.3d at 571. Although PRT is not a BOC and thus is not subject to Section 271 of the Act, the Commission's Section 271 precedent is instructive here, since it recognizes that ILECs should not be penalized by a lack of competitive entry:

[W]e conclude that a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act, *or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and practical matter.* Application of Ameritech Michigan Pursuant to Section 271, 12 FCC Rcd 20543, ¶ 110 (1997).

Indeed, in Section 271 itself Congress acknowledged that LECs might be prevented from entering the long-distance market through no actions of their own if the LEC was required to actually provision elements in order to comply with the Section. Application of SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, Interlata Services in Oklahoma, 12 FCC Rcd 8685, ¶ 55 (1997). Under the "Track B" method of 271 compliance, the statute "requires only that a BOC 'offer[]' the items included in the checklist" and "does not contemplate the existence of competitive local entry." *Id.* at ¶ 46. Congress thus created a system to ensure LECs were not "unfairly penalized in the event that potential competitors do not come forward to request access and interconnection." *Id.*

<sup>26</sup> *USTA II*, 359 F.3d at 575.

competition in other markets as “irrelevant to the existence of impairment” in another market where there might not yet be actual competition.<sup>27</sup>

PRT has developed the processes necessary to offer network elements to any CLEC that requests them. The Puerto Rico market *is* competitive, with a wide variety of carriers actually competing for both enterprise and mass market customers. However, to the extent that the Commission believes that other, similar markets are more competitive, this is not a justification for finding impairment in Puerto Rico. In fact, under the *USTA II* standard, just the opposite is true—the existence of competition in similar markets shows that additional competition could occur in Puerto Rico. It would be an absurd result if PRT’s provisioning processes were found to be a barrier to competitive entry simply because few carriers wish to seek such entry, given the crutch afforded by below-cost access to UNE-P.

**C. WorldNet’s Allegations About Provisioning Problems Are Inaccurate and Based on Outdated Information**

WorldNet claims that alleged problems with provisioning of UNE-P orders should be considered in determining whether there is impairment in UNE-L provisioning. However, WorldNet’s claims are exaggerated. It is not correct that “PRT[] uses a makeshift code to transfer a circuit to UNE-P which is the same as the code for disconnects.”<sup>28</sup> While PRT’s initial UNE-P provisioning process did involve both a disconnect and reconnect code, leading to some trouble with inadvertent disconnects, this process was improved and the problems solved by early 2003.

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<sup>27</sup> *Id.*

<sup>28</sup> WorldNet Comments at 21.

It is also not correct that PRT's composite billing is an "unresolved problem" that "stand[s] out."<sup>29</sup> PRT's composite billing process is consistent with the requirements of the parties' current interconnection agreement and was developed in conjunction with WorldNet's technical experts. There is no "problem" with the current structure other than the fact that WorldNet would prefer a different one.

In any event, the billing structure about which WorldNet complains is not relevant to UNE-L provisioning. WorldNet's alleged concerns involve billing for metered switch usage, something that only occurs where the CLEC is buying switching capacity from the ILEC. Thus, even if WorldNet's claims had any basis, which they do not, they have no bearing on whether there are problems with CLEC facilities deployment.

#### **D. WorldNet's Switch Data Are Profoundly Flawed**

In an attempt to divert attention away from the obvious fact that both intermodal and facilities-based competition are robust and getting stronger in Puerto Rico, WorldNet rehashes the same flawed switch data that the TRB erroneously accepted in its enterprise switching proceeding. As PRT explained in its comments on the TRB petition, these data are misleading.<sup>30</sup>

WorldNet claims that of the 108 switches in Puerto Rico, only 4 are owned by a competitor.<sup>31</sup> These numbers are inaccurate and misleading. While Centennial has 4 host switches, it has many more remotes. The number of comparable host switches owned by PRT is 29, a number much smaller than that given by WorldNet. In any event, the number of switches owned by one carrier versus another has absolutely no correlation with competitive entry. CLEC

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<sup>29</sup> *Id.*

<sup>30</sup> PRT Enterprise Switching Comments at 7-9.

<sup>31</sup> WorldNet Comments at 18.

switches can provide service to much broader swaths of the population than can ILEC switches, since they are free from the constraints of legacy design and the provision of universal service. The FCC reached this very conclusion in the *Triennial Review Order*.<sup>32</sup>

Even if the number of switches were somehow relevant, which it is not, WorldNet ignores wireless switches. As described above, these facilities are used to provide service to about 50 percent of the telephone lines in the Commonwealth. WorldNet also ignores the fact that relatively inexpensive “soft switches,” used to provide VoIP, are already being deployed to serve Puerto Rico.

The fact that some or all of the competitive switches in Puerto Rico (whether wireline or wireless) may not be available for competitive access to UNE loops is also irrelevant.<sup>33</sup> Indeed, this argument betrays the self-interested desire to preserve its own business model at the expense of all other competitors that underpins WorldNet’s comments from start to finish. The goal of the 1996 Act is not to ensure that WorldNet has access to someone else’s switch. In fact, just the opposite is true. The goal of the Act is to “advance the development of *facilities-based* competition,” and the unbundling rules must be “based on a preference for *facilities-based* competition.”<sup>34</sup> As the D.C. Circuit found:

[T]he purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that the government can mandate. Rather, its purpose is to stimulate competition—preferably genuine, facilities-based competition.<sup>35</sup>

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<sup>32</sup> *TRO*, ¶ 436.

<sup>33</sup> WorldNet Comments at 18.

<sup>34</sup> Unbundled Access to Network Elements, WC Docket No. 04-313 & CC Docket No. 01-338, FCC 04-179, ¶ 2 (rel. Aug. 20, 2004) (emphasis added).

<sup>35</sup> *USTA II*, 359 F.3d at 576.

In other words, the rules must encourage companies to build their own facilities, and to discourage carriers from an indefinite reliance on the property of others. The indisputable facts in Puerto Rico show that Centennial, AT&T Wireless, Sprint, Movistar, and Cingular all find it economic to buy and install switches to serve customers. There is no reason to think that WorldNet, shorn of its ability to access low-cost switching belonging to someone else, would be unable to make this very same investment.<sup>36</sup>

Finally, WorldNet's cost information has no basis, substantially overstating the amount of investment necessary to add a switch in Puerto Rico and substantially underestimating the revenues available to a potential CLEC competitor using its own switch. PRT demonstrated to the TRB in the enterprise waiver proceeding that a switch can be purchased and installed for as little as \$500,000. PRT also showed that PRT's top 100 retail enterprise customers generate approximately \$8,000,000 in revenue per month, and that over 750 PRT customers generate more than \$4,000 per month in revenue each. A CLEC targeting these customers could easily justify the minimal capital expense necessary to install its own facilities. The best illustration of this fact, which WorldNet makes no attempt to explain, is that Centennial *is already doing it*.

#### **E. Other Information Provided By WorldNet Is Inaccurate or Irrelevant**

WorldNet claims that PRT is not providing LNP to CLECs in Puerto Rico, but this is simply not the case. PRT routinely ports numbers, both intramodally and intermodally. The TRB's outdated and erroneous conclusion to the contrary, cited by WorldNet,<sup>37</sup> was based upon a single complaint filed as a result of a number of minor problems that occurred very early in the

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<sup>36</sup> Of course, even if WorldNet itself could not develop a business plan for deploying facilities, that does not mean that there is "impairment" without access to switching. The fact that at least five other carriers are prospering having invested in their own switches belies any such notion.

<sup>37</sup> WorldNet Comments at 22.



process.<sup>38</sup> In fact, this complaint, which PRT maintains was meritless, was never resolved, and was held in abeyance after the parties resolved the issues in question.<sup>39</sup>

WorldNet also claims that PRT has little experience in securing cooperative rights-of-way agreements. As with hot cuts, WorldNet's argument here centers on the fact that there has been little or no demand for PRT to engage in joint provisioning. Given that CLECs are simply not requesting this service, it is not clear how "PRT[] remains in a position to frustrate CLEC efforts to deploy facilities."<sup>40</sup>

#### **IV. There is No Evidence of Impairment in High Capacity Loops, Dedicated Transport, or Dark Fiber**

As WorldNet acknowledges, Centennial has deployed a substantial network consisting of its own high-capacity transport facilities in Puerto Rico. In its 10K filing with the SEC, Centennial states that its fiber optic network in Puerto Rico consists of 1,700 miles of fiber-optic cable and connects 1,100 buildings. Centennial uses its network facilities to offer a range of high-speed data services, from 56 Kbps to OC-48 (2.4 Gbps),<sup>41</sup> and including Gigabit Ethernet and ATM services.<sup>42</sup>

Given that the urban markets in Puerto Rico are similar in density to markets elsewhere in the United States, it is reasonable to assume that other carriers can and will follow suit, just as they have done throughout the United States. Again, just because carriers have elected not to

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<sup>38</sup> PRT Enterprise Waiver Comments at 15.

<sup>39</sup> *Id.*

<sup>40</sup> WorldNet Comments at 22.

<sup>41</sup> [http://www.centennialpr.com/broadband/internet\\_dedicated.asp](http://www.centennialpr.com/broadband/internet_dedicated.asp).

<sup>42</sup> [http://www.centennialpr.com/broadband/internet\\_ethernet.asp](http://www.centennialpr.com/broadband/internet_ethernet.asp) and [http://www.centennialpr.com/broadband/internet\\_atm.asp](http://www.centennialpr.com/broadband/internet_atm.asp).

pursue this particular course of investment does not mean that there are any economic or operational barriers to doing so.

WorldNet claims that even if a CLEC were to buy a switch, it would have “no option but to rely on PRT[] interoffice transport and high capacity loops to provide service to customers.”<sup>43</sup> While WorldNet intimates that this leads inexorably to a finding of impairment, that is not the case. The *USTA II* court made clear that the Commission may not “compare unbundling only to self-provisioning, arbitrarily excluding alternatives offered by the ILECs.”<sup>44</sup> In Puerto Rico, PRT provides special access services at reasonable costs. These services are available throughout the Commonwealth, and there is no evidence on the record, provided by WorldNet or otherwise, that CLECs would be impaired in providing any service if they purchased special access services from PRT.<sup>45</sup>

#### **V. The FCC Cannot Continue to Impose Unlawful Unbundling**

PRT agrees with the comments of Verizon on the issue of transition.<sup>46</sup> To the extent that the Commission finds that CLECs are not impaired without access to a specific network element, there must be an immediate freeze on the addition of new customers using that element, without regard to the provisions of specific interconnection agreements. This flows logically from the structure of the Act, which empowers the FCC to impose unbundling obligations only once it has determined that the statutory criteria are met. The Act does not contemplate, and the Commission does not have authority to adopt, any “interim” or “transitional” mechanisms.

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<sup>43</sup> WorldNet Comments at 23.

<sup>44</sup> *USTA II*, 359 F.3d at 577.

<sup>45</sup> In alleging that “it is entirely unclear” whether PRT has the systems in place to facilitate cross-connections in its central offices, WorldNet inadvertently demonstrates that the Commission cannot find impairment on this record. Where “it is entirely unclear” that there is impairment, no impairment finding can be supported.

<sup>46</sup> Verizon Comments at 128-138.

With respect to UNE arrangements in the “embedded base” of customers, the FCC must ensure that prices move promptly either to lawful rates or to negotiated rates as part of commercial agreements.<sup>47</sup> These arrangements were obtained pursuant to rules that have now been before the courts and vacated on three separate occasions, and there is no legal justification for allowing these arrangements to continue for an “interim” or “transitional” period.

Beyond the basic fact that the Commission lacks the legal authority to order ILECs to continue providing UNEs when there is no evidence of impairment, the balance of equities dictates that these unlawful UNE arrangements be swept aside promptly. Continuing to subject the market to the uncertainties endemic in “transitional” or “interim” rules unfairly harms the ILECs, unfairly rewards CLECs, and ultimately damages both customers and competition by preventing carriers from reaching lawful, sustainable commercial agreements. Further, the CLECs, who have been reaping the benefit of unlawful rules of one kind or another for eight years, cannot claim to be harmed by the rapid imposition of rules that actually comport with the strictures of the 1996 Act.

There is also no justification for forcing ILECs to go through a “change of law” provision when the only purpose of such an exercise would be to maintain otherwise unlawful obligations. PRT and other ILECs did not voluntarily agree to provide UNEs at below-cost rates. Rather, they were forced to enter into such agreements as a result of erroneous interpretations of federal law.

Finally, the Commission must make clear to state commissions that they cannot interfere in the process of moving toward lawful rates and away from unlawful unbundling. The *USTA II* court’s direction is clear: States do not have the authority to make unbundling decisions, and the

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<sup>47</sup> *Id.*

FCC does not have the ability to delegate such authority to them.<sup>48</sup> There is no exception for “interim” rules, or “temporary” rules, or rules designed to ease the burden on competitors. The FCC should act to ensure that ILECs are not held to another round of burdensome proceedings at the state level in order to try and secure the rights that the federal courts have already re-affirmed.

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<sup>48</sup> *USTA II*, 359 F.2d at 564-65.

## **VI. Conclusion**

For the foregoing reasons, the Commission should find that there is no impairment in Puerto Rico with respect to switching (either enterprise or mass market), high-capacity loops, dedicated transport, or dark fiber. The FCC should also provide for a rapid move away from existing unbundling obligations and toward lawful regimes.

Respectfully Submitted,

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October 19, 2004

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of

Review of the Section 251 Unbundling  
Obligations of Incumbent Local Exchange  
Carriers

CC Docket No. 01-338

Implementation of the Local Competition  
Provisions of the Telecommunications Act  
of 1996

CC Docket No. 96-98

Deployment of Wireline Services Offering  
Advanced Telecommunications Capability

CC Docket No. 98-147

**COMMENTS OF PUERTO RICO TELEPHONE  
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## SUMMARY

The Telecommunications Regulatory Board of Puerto Rico (“Puerto Rico Board”) has filed a Petition<sup>1</sup> seeking a waiver, for every market in Puerto Rico, of the Commission’s national finding that CLECs are not impaired without unbundled access to incumbent LEC’s circuit switching in order to serve enterprise customers.<sup>2</sup> The Puerto Rico Board’s Petition falls far short of meeting the heavy burden necessary to justify a waiver of the Commission’s national finding. To carry that burden, a state must produce evidence different from the facts reviewed by the Commission during the *Triennial Review* proceeding, not simply craft its own rationale for why the national finding does not apply in its state. Moreover, the 1996 Act, court decisions, and the *TRO* require that the requesting state provide specific evidence of actual impairment, not mere speculation about possible impairment.

Here the burden must be especially high, because the Commission had before it in its Triennial Review decision specific evidence relating to competition in Puerto Rico. That evidence only supports the Commission’s conclusions. Not only does it show that carriers *can* enter this market, it demonstrates that there is actual entry — with a competing carrier serving thousands of enterprise customers using its own switches.

Given these facts, the only way the Board was able to reach a contrary result from the Commission was to establish its own test for impairment, relying on irrelevant factors and unsupported allegations. The Commission should deny the Petition.

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<sup>1</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment in Defined Puerto Rico Markets (filed Dec. 30, 2003) (“Petition”).

<sup>2</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 451 (2003) (“Triennial Review Order” or “TRO”).



## DISCUSSION

### **I. A State Commission Seeking a Waiver of the Commission’s National Finding of “No Impairment” Bears a Heavy Burden.**

In the *TRO*, the Commission found that “record evidence establishes that” there is “no operational or economic impairment on a national basis” to “deploying competitive switches to serve customers in the enterprise market.”<sup>3</sup> The Commission based this conclusion on a detailed discussion of a voluminous record, consisting of information submitted by a wide range of commenting parties, including both incumbent and competitive carriers.<sup>4</sup> In particular, the Commission found that the characteristics of the enterprise market nationwide — including the “significant revenues [available] to the service provider,” the ability “to enter[] into long-term contracts,” and a greater “willing[ness] to tolerate any provisioning difficulties” — demonstrate that the “denial of access to unbundled switching would not impair a competitor’s ability to serve the enterprise markets.”<sup>5</sup> Indeed, the FCC found extensive evidence of actual facilities-based competition in the enterprise market — “competitive LECs are competing successfully in the provision of switched services...to medium and large enterprise customers without unbundled circuit switching.”<sup>6</sup>

The Commission’s *national* finding of no impairment for enterprise circuit switching applies with as much force in Puerto Rico as it does in the rest of the United States. Indeed, the record before the Commission during the Triennial Review proceeding contained detailed factual information regarding the entire country, including material submitted by both WorldNet (the

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<sup>3</sup> *TRO*, ¶ 451.

<sup>4</sup> *Id.*, ¶¶ 451-453.

<sup>5</sup> *Id.*, ¶ 453.

<sup>6</sup> *Id.*, ¶ 453.

largest resale/UNE-P CLEC operating in Puerto Rico) and by PRT specifically covering Puerto Rico.<sup>7</sup> WorldNet explicitly sought the creation of an exception for Puerto Rico, based on an alleged lack of competition in the Commonwealth.<sup>8</sup> The Commission, however, declined WorldNet's invitation.

Although the Commission permitted state commissions to seek a waiver of that national finding,<sup>9</sup> there can be no doubt that such a waiver could be justified only if based on evidence *other than* that considered by the Commission. As the FCC explained, the extensive record before it “show[ed] no impairment on a national basis” and did “not contain any evidence identifying any particular markets where competitive carriers would be impaired without unbundled access to local circuit switching to serve enterprise customers.”<sup>10</sup> While state commissions may seek to “rebut th[at] national finding of no impairment,”<sup>11</sup> the Commission did

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<sup>7</sup> See, e.g., Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Feb. 12, 2003); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Jan. 17, 2003); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Jan. 17, 2003); Letter from José E. Arroyo Dávila on behalf of PRT to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (December 24, 2002); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 13, 2002); Letter from Lawrence R. Freedman and Aimee E. Knapp, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 11, 2002); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 2, 2002).

<sup>8</sup> Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Feb. 12, 2003).

<sup>9</sup> The Commission explained that, under its “governing rules,” “[a]ny provision of [its] rules may be waived by the Commission . . . on petition.” *TRO* ¶ 455 n.1395 (quoting 47 C.F.R. § 1.3). Such waivers are “appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

<sup>10</sup> *TRO*, ¶¶ 454-455.

<sup>11</sup> *Id.*, ¶ 455.

not permit them to revisit the conclusions that it reached based on the extensive record in the Triennial Review proceeding. Accordingly, a state commission filing a waiver petition must rely on types of evidence that were not before the Commission when it made its national finding of no impairment.

Moreover, a state commission must present specific evidence of actual, existing operational and economic barriers to entry. As the Commission explained, it had not been presented with “specific evidence” that would justify creating any exceptions to its national finding of no impairment.<sup>12</sup> State commissions, therefore, may not rely on mere guesswork or conjecture about potential economic or operational barriers to entry when submitting a waiver request.

The Puerto Rico Board, like any other state commission, thus bears a heavy burden in seeking a waiver of the FCC’s finding. The Board has failed to meet that burden. As an initial matter, the Board claimed that it was under no obligation to examine evidence regarding the economic feasibility of competitive deployment of circuit switches to serve enterprise customers.<sup>13</sup> But it is clear that any valid impairment inquiry requires, at a minimum, consideration of the potential revenues available to a new entrant. *See, e.g., TRO*, ¶ 457 (“states *must* weigh competitive LECs’ potential revenues from serving enterprise customers in a particular geographic market”) (emphasis added); *id.* ¶¶ 457-458 (“where competitive LECs have the opportunity to earn revenues that outweigh the costs associated with entry,” which include “costs imposed by both operational and economic barriers,” “carriers *are not impaired*”)

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<sup>12</sup> *Id.*, ¶ 456.

<sup>13</sup> *See* Petition at 25-26.

(emphasis added). *See also id.*, ¶ 84. The Board’s failure to consider such evidence, in and of itself, provides grounds for denial of the Board’s petition.

In addition, as explained below, in considering purported operational barriers to entry the Board rejected the FCC’s conclusions in favor of its own analysis, misapplied that analysis to the record in the case, artificially limited the evidence it considered, and incorrectly construed that limited evidence.

## **II. The Puerto Rico Board Conducted an Analysis Largely Unencumbered By the FCC’s Conclusions in the *Triennial Review Order* or the Facts in the Record.**

In its Petition, the Puerto Rico Board first revisits matters that the Commission itself already decided, as if the Board were conducting a *de novo* review of the national no impairment finding. The Board then ignored or misconstrued facts in the record.

### **A. The Puerto Rico Board’s Petition Second-Guesses the Commission’s Conclusions.**

In its Petition, the Board relies heavily on the supposed uniqueness of the Puerto Rico market.<sup>14</sup> However, the Board provides neither evidence nor persuasive argument to show why Puerto Rico is differently situated from any other part of the United States, or why competitive entry in Puerto Rico is more difficult than in similar markets throughout the country.

In making its national finding of no impairment, the Commission relied on factors common to enterprise markets nationally. Although the Commission also noted that, consistent with its findings that competitive deployment of circuit switches to serve enterprise customers is economic, facilities-based CLECs have made substantial in-roads into the enterprise market, those findings were not designed to be a minimum standard, without which there is impairment.

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<sup>14</sup> *Id.* at 15-19.

Instead, as explained above, the Commission analyzed the possibility of competing in *all* markets throughout the United States, *including Puerto Rico*.<sup>15</sup>

Accordingly, whether competition is less developed in markets in Puerto Rico than in markets in other states — the claim that forms the bulk of the Board’s Petition — is beside the point. The question, as the D.C. Circuit has made clear, is whether the element in question is “unsuitable” for competitive supply.<sup>16</sup> As the Commission found, enterprise switching *is* suitable for competitive supply, because features of the enterprise market provide CLECs with “revenue opportunities . . . sufficient to justify the . . . costs associated with using and installing the switch.”<sup>17</sup> The fact, which the Board highlights, that a facilities-based CLEC currently provides service to enterprise customers in Puerto Rico demonstrates that these same features exist in Puerto Rico.<sup>18</sup> Indeed, the presence of this one carrier confirms that it is economically feasible for facilities-based carriers to enter the Puerto Rico market, and that such carriers are not impaired.

**B. The Puerto Rico Board Misapplied Its Own Test to the Evidence in the Record.**

The Puerto Rico Board’s errors were not confined to revisiting the FCC’s conclusions about impairment. The Petition goes on to misread fundamentally the evidence in the record. Even using the Puerto Rico Board’s own standards, the record simply does not justify a finding of impairment in enterprise switching in Puerto Rico.

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<sup>15</sup> The contours of the market in Puerto Rico have not changed substantially since the Commission considered the information submitted by PRT and WorldNet, and thus many of the facts that made up the record before the Puerto Rico Board were also before the FCC during its consideration of the Triennial Review proceeding.

<sup>16</sup> *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

<sup>17</sup> *TRO*, ¶ 452.

<sup>18</sup> Petition at 16.

First, the Petition attempts to minimize the level of competition in Puerto Rico. The Puerto Rico Board erroneously claims that there has not been “significant” deployment of wireline switches in Puerto Rico.<sup>19</sup> The statistics used by the Puerto Rico Board to justify this conclusion are misleading. The Puerto Rico Board argues that only four of the 108 switches in Puerto Rico are owned by competitors, and that CLECs have thus deployed only 3 percent of the switches in the Commonwealth.<sup>20</sup> But the number of switches owned by PRT — which include switches used to serve residential customers — relative to the number of switches deployed by CLECs provides no insight into the ability of CLECs to offer service. PRT uses a legacy network built to provide universal service throughout the island. CLECs, free of such considerations, can provide service to enterprise customers using fewer (but more centrally located) switches. The Commission has acknowledged that CLEC “switches are capable of serving significantly broader service areas than traditional incumbent LEC rate centers.”<sup>21</sup> As PRT showed, enterprise customers in Puerto Rico are heavily concentrated in three metropolitan markets, San Juan, Mayaguez, and Ponce.<sup>22</sup> Switches serving these regions would cover a large percentage of the enterprise customers in the Commonwealth. Moreover, the small geographic size of Puerto Rico means that competitive carriers can serve wireline customers throughout Puerto Rico by converting existing switches to provide local switching capability and connecting their transport networks to these convertible switches over leased or self-deployed T1 lines.<sup>23</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *TRO*, ¶ 436.

<sup>22</sup> FCC’s Triennial Review Order, Brief of Puerto Rico Telephone Company, Inc., Case No. JRT-2003-CCG-0004, at 10-11 (filed December 16, 2003) (“PRT Brief”).

<sup>23</sup> *Id.* at 11.

The Puerto Rico Board attempts to justify its finding that there is little competitive penetration in Puerto Rico by saying that “3 percent is the same small market penetration percentage that the FCC cited in finding *impairment* with regard to mass market local circuit switching.”<sup>24</sup> The FCC’s finding, however, referred to the *percent of lines served*, not the percent of switches owned, which is the basis for the 3 percent number in Puerto Rico that the Board cites.<sup>25</sup> There is no relationship between the percentage of lines served (which may be relevant to competitive penetration) and the percentage of switches owned (which is wholly irrelevant to the question).

Moreover, the Puerto Rico Board’s characterization glosses over the simple, competitive reality that Centennial, a facilities-based CLEC in Puerto Rico, has deployed four of its own switches and has spent hundreds of millions of dollars installing these switches and constructing the network to support them.<sup>26</sup> This investment is apparently paying off, as Centennial continues to invest in the market; its fourth switch was activated recently. Centennial provides service to several thousand enterprise customers using these facilities, and is aggressively moving to expand its already sizable market share.

In light of Centennial’s success, the Board cannot possibly make an “affirmative finding of impairment” that could “rebut the national finding of no impairment.”<sup>27</sup> Indeed, if the Board were to be believed, Centennial is doing the impossible. Centennial’s expansion in the Puerto

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<sup>24</sup> Petition at 16 (emphasis in original).

<sup>25</sup> *TRO*, ¶ 438.

<sup>26</sup> More precise figures regarding the investment made by Centennial were available to the Board during its proceeding on a confidential basis.

<sup>27</sup> *TRO*, ¶ 455.

Rico market demonstrates conclusively that facilities-based entry into that market is economically possible, and thus cannot be “uneconomic.”

### **III. The Puerto Rico Board’s Cursory Analysis of the Factors Specifically Mentioned in the *Triennial Review Order* Is Deeply Flawed.**

While the Puerto Rico Board underpins much of its Petition with the consideration of inappropriate factors and flawed interpretations of the record, the Puerto Rico Board does give some mention of the factors articulated by the FCC in the *TRO*. However, the Puerto Rico Board’s conclusions here rest on an inaccurate analysis or mistaken conclusions regarding the record, as well. Moreover, the Puerto Rico Board’s arbitrary exclusion of certain facts makes it impossible for the Petition to demonstrate that impairment exists in enterprise switching in Puerto Rico.

#### **A. There Is No Evidence of Impairment In Providing UNE Loops or Cross-Connects.**

The Board notes that carriers are not currently providing service to customers in Puerto Rico using stand-alone UNE loops (“UNE-Ls”).<sup>28</sup> But this is because, as the Petition fails to note, no CLEC in Puerto Rico has yet ordered a stand-alone UNE loop.<sup>29</sup> The Petition makes the same assertion regarding cross-connects,<sup>30</sup> despite the record evidence showing that PRT has not had the opportunity to provide cross-connects yet because of delays by Centennial in completing its collocation arrangements.<sup>31</sup>

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<sup>28</sup> Petition at 17.

<sup>29</sup> *Id.* at 20.

<sup>30</sup> *Id.*

<sup>31</sup> PRT Brief at 25-26.



The fact that CLECs have not ordered UNE loops or cross-connects is not evidence of “operational factors [that] are impairing competitors.”<sup>32</sup> On the contrary, the fact that Centennial is serving thousands of enterprise customers *without* UNE loops or cross-connects demonstrates that CLECs in Puerto Rico, as in the rest of the country, are not impaired without unbundled switching to serve enterprise customers. Moreover, given the existence of the prior unbundling obligations, it is not surprising that many CLECs have chosen to take advantage of low-cost access to PRT switching facilities, rather than shouldering the cost of deploying their own switches. The Commission itself recognized this in the *TRO*, finding that “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”<sup>33</sup> Nonetheless, the substantial market penetration that CLECs have gained in Puerto Rico using resale and UNE-P — 14% of enterprise customers are served through these two routes — give these companies both a customer base and revenue stream that would justify installing their own switches once they can no longer obtain unbundled switching for these customers.

Nor is there any reason to suspect that PRT would not be able to provision UNE loops or cross-connects when they are requested. The Board attempts to shore up its speculative claims of impairment by relying on certain billing difficulties PRT experienced when originally provisioning UNE-P services.<sup>34</sup> This reliance is misplaced. First, the Petition erroneously suggests that these billing errors continue unabated.<sup>35</sup> In fact, the problems to which the Puerto Rico Board refers were resolved, and PRT is provisioning UNE-P orders routinely and without

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<sup>32</sup> *TRO*, ¶ 456.

<sup>33</sup> *Id.*, ¶ 3.

<sup>34</sup> Petition at 22.

<sup>35</sup> *Id.*

incident.<sup>36</sup> Indeed, the methods and procedures that PRT has developed in order to provide UNE-P give PRT an established and existing set of processes that can be utilized to provide UNE-Ls, when and if orders for such loops are received. Second, the difficulties the Board cites with respect to PRT initial provisioning of UNE-P involved billing for metered switch usage, which is not an issue when a CLEC orders UNE loops.<sup>37</sup>

**B. The Puerto Rico Board's Conclusions on Collocation Are Erroneous and Based on Incomplete Evidence.**

The Petition also incorrectly asserts that there is impairment resulting from collocation difficulties in Puerto Rico.<sup>38</sup> This is an impermissible inference from the record in this case, relying on argument and allegations rather than solid factual submissions. Moreover, it is compounded by the Puerto Rico Board's arbitrary exclusion of highly probative evidence submitted by PRT.

In the Petition, the Puerto Rico Board avers that the "only attempt that PRT has made to provide collocation...resulted in a formal complaint filed with the [Puerto Rico] Board."<sup>39</sup> A complaint filed at the Puerto Rico Board, however, is merely a document containing unproven

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<sup>36</sup> PRT Brief at 24. The Puerto Rico Board's conclusion is based solely on testimony provided by a CLEC. As explained in note 44, *infra*, PRT provided declarations rebutting this testimony, but the Board improperly excluded this information from its analysis.

<sup>37</sup> *Id.*

<sup>38</sup> Petition at 21. The Commission's inclusion of collocation as one of the specifically enumerated factors that state authorities should consider in their enterprise switching analysis is itself problematic. As then Commissioner Powell noted in the *UNE Remand Order*, collocation is a matter separate and apart from the unbundling of switching facilities. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (Statement of Commissioner Michael K. Powell, Dissenting in Part). To the extent that there are difficulties with collocation, these difficulties should be resolved without reference to switching impairment. Imposing unbundling obligations on enterprise switching will not resolve collocation problems, and "may just be layering ineffective rules on top of ineffective rules." *Id.*

<sup>39</sup> Petition at 21.

allegations. To conclude that CLECs suffer from impairment in the provision of collocation because a single company filed an unsubstantiated complaint with the Puerto Rico Board is improper. In any event, the complaint that the Puerto Rico Board refers to, filed by Centennial, was rapidly resolved by the parties involved, and has since been held in abeyance by agreement of the parties.<sup>40</sup>

The Puerto Rico Board also contends that Centennial's collocation requests have been "pending with PRTC for over three years," inaccurately implying that PRT is responsible for an extensive delay in providing collocation.<sup>41</sup> In fact, while Centennial first made its original collocation requests three years ago, these requests were withdrawn and resubmitted, and have not been pending for the entire three year period. Further, the record shows that Centennial itself is responsible for the timing of completing and provisioning these collocation requests.<sup>42</sup> Centennial decided to use its own subcontractors to build the collocation arrangements, and as a result completion of the collocation arrangements is affected by factors well outside of PRT's control.<sup>43</sup>

Finally, the Puerto Rico Board cites to submissions made by Centennial that allege that despite the resolution of the complaint, there remained outstanding issues in the provision of collocation.<sup>44</sup> PRT provided the Puerto Rico Board with declarations addressing this issue, which show that at the time the Puerto Rico Board was making its decision, the outstanding

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<sup>40</sup> PRT Brief at 27.

<sup>41</sup> Petition at 21-22.

<sup>42</sup> PRT Brief at 27. At the time of the hearing, PRT and Centennial were working through the steps needed for final acceptance of two Centennial collocation sites.

<sup>43</sup> *Id.*

<sup>44</sup> Petition at 22.

issues between PRT and Centennial stemmed primarily from Centennial's mistaken belief that special access services are available at a discount through the parties' interconnection agreement, rather than through the tariff.<sup>45</sup>

#### **IV. The Petition Contains Other Serious Errors.**

##### **A. The Puerto Rico Board's Exclusion of Evidence Relating to Carriers Using Wireless Switches to Provide Wireline Service is Arbitrary.**

Evidence in the record before the Puerto Rico Board showed that wireless carriers can upgrade wireless switches to provide wireline service, and that in fact Centennial is doing so in Puerto Rico.<sup>46</sup> Once Centennial upgraded its switch, it became a multi-purpose wireless/wireline switch. This is not an example of intermodal competition; Centennial is both a wireline and wireless competitor that decided it was economically rational to upgrade its wireless facilities to provide wireline service to enterprise customers.

This evidence is directly relevant to the cost of installing switching facilities in Puerto Rico, because it means that existing wireless carriers can cost-effectively upgrade equipment that they already possess in order to serve wireline customers. While WorldNet raised a number of objections to considering wireless switches in the Puerto Rico Board's impairment

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<sup>45</sup> The Puerto Rico Board improperly excluded these declarations from the record, and rejected a motion by PRT to reconsider this exclusion. *See FCC's Triennial Review Order*, Resolution and Order, Case No. JRT-2003-CCG-004 (December 30, 2003). The Puerto Rico Board claimed that this information was not timely filed, despite the fact that there was no deadline for the submission of factual information in effect at the time of submission, and the declarations themselves were filed to respond to information redacted and released by the Puerto Rico Board only five days prior to their filing. It is unclear when the Puerto Rico Board expected this type of testimony to be filed. Moreover, the Puerto Rico Board never explained how any party would be prejudiced by review of this information, or how the public interest was served by excluding this type of information from its deliberations. Without the benefit of the facts in these declarations, it is impossible for the Puerto Rico Board to have rendered an informed decision on the question of collocation impairment.

<sup>46</sup> PRT Brief at 21.

determination,<sup>47</sup> the fact that Centennial is using an upgraded wireless switch to provide wireline service is undisputed.

Despite the relevance of this evidence, the Puerto Rico Board declared it a “competitive anomaly” and declined to afford weight to it.<sup>48</sup> The Board stated that if it “were to place undue weight on this fact, the number of competitive wireline providers would be circumscribed by the number of wireless carriers serving the Commonwealth.”<sup>49</sup> The exact meaning of this argument is not clear, but the Puerto Rico Board appears to be concerned either that competition in the wireless sector would mask a lack of competition in the wireline sector, or that competitive entry in the wireline sector would be limited by the number of carriers providing wireless service. Either of these concerns are a *non sequitur*. The fact that wireless carriers can — and do — upgrade their switches to serve wireline customers *expands* the pool of potential entrants into the enterprise market and provides further evidence that the Commission’s national impairment finding was as correct for Puerto Rico as for the rest of the nation.

**B. The Puerto Rico Board Considered Other, Irrelevant Factors.**

The Puerto Rico Board also improperly considered factors irrelevant to the switching analysis. Because these factors provide no insight into the question of enterprise switching impairment, they do not form a proper basis for a waiver of the FCC’s national finding.

First, the Puerto Rico Board asserts that PRT has “largely ignored” its Local Number Portability (“LNP”) obligations.<sup>50</sup> But the Board bases its claim on the fact that there was a *single* complaint, involving a handful of delayed LNP requests early in the process. No further

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<sup>47</sup> *Id.* at 22.

<sup>48</sup> Petition at 17 n. 23.

<sup>49</sup> *Id.*

<sup>50</sup> Petition at 24.

problems after this initial start-up period have even been alleged by the original complainant. In addition, no final action has been taken on this complaint, and PRT maintains that the complaint itself is without merit. The Puerto Rico Board's citation of this complaint as "evidence" of impairment is another example of the Board attributing improper weight to unproven allegations and assertions.

Second, the Puerto Rico Board also grounds its Petition on its claim that "PRTC has little to no experience in cooperating with competitors to gain or share access to necessary easements or rights-of-way."<sup>51</sup> But the Puerto Rico Board bases its finding here not on evidence of impairment, but rather on the fact that there have been no requests. In any event, the inquiry here is whether CLECs are impaired without access to unbundled *switching*. Access to rights-of-way, as the Commission recognized, is relevant, if at all, to determining whether CLECs are impaired in deploying *loops*.<sup>52</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, TRO ¶¶ 237, 309.

**V. Conclusion**

For all of the foregoing reasons, the Puerto Rico Board's Petition seeking waiver of the Commission's national finding of no impairment for enterprise switching as applied to Puerto Rico should be denied.

RESPECTFULLY SUBMITTED,

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Its Attorneys

January 30, 2004

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of

Review of the Section 251 Unbundling  
Obligations of Incumbent Local Exchange  
Carriers

CC Docket No. 01-338

Implementation of the Local Competition  
Provisions of the Telecommunications Act  
of 1996

CC Docket No. 96-98

Deployment of Wireline Services Offering  
Advanced Telecommunications Capability

CC Docket No. 98-147

**REPLY COMMENTS OF PUERTO RICO TELEPHONE  
COMPANY, INC. ("PRT")**

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## **I. Introduction**

As PRT showed in its initial comments in this matter,<sup>1</sup> the waiver petition submitted by the Puerto Rico Board is wholly inadequate.<sup>2</sup> The Petition provides no basis for granting a waiver of the Commission's national finding that CLECs are not impaired without unbundled access to enterprise switching. There is no merit to the Board's assertions that the enterprise market in Puerto Rico is different from every other such market in the United States.

The only comments submitted in support of the Petition — by WorldNet, a UNE-P CLEC, and TLD, a reseller — add nothing to the Board's facially insufficient claims.<sup>3</sup> Neither TLD nor WorldNet has any experience providing facilities-based service. WorldNet and TLD incorrectly state the standard the Commission must apply in reviewing the Board's waiver petition and present unsupported assertions that not only are not evidence, but also serve to highlight the speculative nature of the "findings" of the Puerto Rico Board. WorldNet also submits information that the Puerto Rico Board considered during its proceeding, but either chose not to include in its petition or specifically declined to rely on. The Commission should deny the Petition.

## **II. TLD and WorldNet Misstate the Proper Standard of Review**

In an attempt to support the unjustified petition submitted by the Puerto Rico Board, TLD and WorldNet each misinterpret the obligations of both state commissions and the FCC under the

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<sup>1</sup> Comments of Puerto Rico Telephone Company, Inc., CC Docket No. 01-338 (filed Jan. 30, 2004) ("PRT Comments").

<sup>2</sup> Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico, CC Docket No. 01-338 (filed Dec. 30, 2003) ("Petition").

<sup>3</sup> Comments of WorldNet Telecommunications, Inc., CC Docket No. 01-338 (filed Jan. 30, 2004) ("WorldNet Comments"); Comments of Telefónica Larga Distancia de Puerto Rico, Inc., CC Docket No. 01-338 (filed Jan. 30, 2004) ("TLD Comments").

decision in the *TRO*. The burden imposed on state commissions seeking a waiver of the FCC's findings is much more substantial than either TLD or WorldNet suggest, and grant of any such waiver petition is far from automatic.

TLD incorrectly claims that the FCC “found that an unbundling obligation does not exist [in high capacity switching] absent a state commission finding of impairment,” and that “state commissions *were required* to perform a granular market analysis” to determine whether there is impairment.<sup>4</sup> Neither of these characterizations is accurate. First, the Commission made a national finding, based on characteristics of enterprise markets nationwide, that the “denial of access to unbundled switching would not impair a competitor’s ability to serve the enterprise markets.”<sup>5</sup> The Commission also found that the record contained no evidence of any particular market in which competing carriers would be impaired without access to unbundled switching.<sup>6</sup> This holding was not contingent on whether any particular state subsequently did or did not find impairment. Nor did the FCC imbue state agencies with authority to make a determination of impairment independent from the Commission’s determination in the *TRO*. Rather, the Commission concluded that states may alter the Commission’s determination of no impairment “only by petitioning this Commission.”<sup>7</sup>

Second, the FCC imposed no requirement upon states to conduct an impairment analysis.<sup>8</sup> Whether to conduct such an analysis, and whether to file a waiver petition at the

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<sup>4</sup> TLD Comments at 2 (emphasis added).

<sup>5</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶ 453 (2003) (“*TRO*”).

<sup>6</sup> *Id.*, ¶ 455.

<sup>7</sup> *Id.*, ¶ 455, n. 1394.

<sup>8</sup> *TRO*, ¶ 455.

conclusion of their analysis, was entirely left to the discretion of the states.<sup>9</sup> In fact, several state commissions chose not to conduct an impairment proceeding at all, and the Puerto Rico Board appears to be the only such commission that filed a waiver request.

Thus, contrary to the claim put forth by WorldNet, this is not a situation where the Commission stayed its hand, seeking “feedback relating to the deployment of local switching” from state commissions prior to acting.<sup>10</sup> Indeed, any such “feedback” would be wholly unnecessary, given that the Commission received evidence from a range of commenters “relating to the deployment of local switching” as part of the Triennial Review process.<sup>11</sup>

Instead, the Commission has made a categorical, national finding that there is no evidence of impairment with respect to enterprise switching, and found only that states could seek a waiver of this finding if the facts justified such a waiver.<sup>12</sup> As a result, any state seeking a waiver of the Commission’s *TRO* finding bears a heavy burden. A waiver petition must rely on types of evidence beyond that available to the Commission in the Triennial Review proceeding, and cannot simply revisit or second-guess the conclusions that the FCC reached after reviewing the same evidentiary record.

Moreover, as even TLD acknowledges, the determination that the state must reach is whether competitors “*are impaired* from entering the Enterprise Market,”<sup>13</sup> not whether competitors *could be* impaired. WorldNet, as well, notes that a states’ inquiry must focus on

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<sup>9</sup> *Id.* (“we *permit* state commissions to rebut the national finding,” and states “*wishing* [to seek a waiver] must make an affirmative finding of impairment”) (emphasis added).

<sup>10</sup> WorldNet Comments at 2.

<sup>11</sup> As PRT made clear in its opening comments, the evidence before the FCC included data relating specifically to Puerto Rico. PRT Comments at 3, n. 7.

<sup>12</sup> *TRO*, ¶ 455.

<sup>13</sup> TLD Comments at 2 (emphasis added).

whether “operational and economic barriers *exist* in a market,” rather than speculating about whether such barriers may come into being at some future date.<sup>14</sup> In order to justify a waiver petition, states must produce the kind of “specific evidence” of actual, existing impairment that the FCC found lacking,<sup>15</sup> and show that the element in question is “unsuitable” for competitive supply.<sup>16</sup>

Finally, the *TRO* does not “mandate[] a grant of the waiver request,” as TLD urges. Nothing in the *TRO* suggests, let alone requires, that the Commission grant any waiver petition a state submits. As with all petitions for waiver, the FCC must weigh the sufficiency of the request, and determine whether it establishes the type of “special circumstances [that] warrant a deviation from the general rule.”<sup>17</sup> Where, as here, a waiver request is wholly deficient, and fails to produce the level of specific evidence required to rebut the FCC findings that underpin the general rule, the Commission is obligated to deny the petition.

### **III. The Assertions of CLECs Are Not Evidence, and Reinforce the Speculative Nature of the Puerto Rico Board’s Petition**

TLD makes a number of assertions in its reply comments about PRT’s alleged performance in permitting resale of its retail services.<sup>18</sup> These allegations are vague and ill-defined, consisting of little more than statements such as “TLD has encountered numerous delays and problems” while negotiating or attempting to enforce interconnection terms.<sup>19</sup> Such broad,

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<sup>14</sup> WorldNet Comments at 3 (emphasis added).

<sup>15</sup> *TRO*, ¶ 456.

<sup>16</sup> PRT Comments at 6, *quoting USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

<sup>17</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

<sup>18</sup> TLD Comments at 4-5.

<sup>19</sup> *Id.* at 4.

general complaints, without any supporting detail, are not evidence and cannot provide a basis for a state commission's finding of impairment that would justify a waiver of the Commission's national finding of no impairment with respect to enterprise switching.

The comments of both TLD and WorldNet also highlight the speculative nature of the Puerto Rico Board's petition. As noted above, TLD provides service using resale, while WorldNet uses UNE-P and resale. Neither of these carriers use their own facilities to provide local service in Puerto Rico, and neither of these carriers have any experience ordering or using the kinds of facilities (UNE loops, cross-connects, and collocation) that the Commission identified as being relevant to the impairment inquiry with respect to enterprise switching.<sup>20</sup> As a result, neither of these carriers can point to any evidence of actual impairment in enterprise switching in any market in Puerto Rico. All that either of these carriers can offer is more of the same guesswork and speculation about possible future impairment that causes the Puerto Rico Board's petition to be so deeply flawed.

#### **IV. Information Not Submitted by the Board Cannot Be Used to Bolster the Board's Inadequate Waiver Request**

WorldNet also seeks to supplement the Board's petition by submitting its filings to the Board.<sup>21</sup> However, the purported facts that WorldNet submits here were presented to the Commission during the Triennial Review proceeding and, therefore were *already* considered and rejected by the Commission when it concluded that the record contained no evidence to support exceptions for particular markets from its *national* finding of no impairment. Therefore, it would

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<sup>20</sup> As PRT noted in its initial comments, making collocation part of the impairment inquiry is problematic. PRT Comments at 11, n. 38. Even if difficulties were shown to exist with collocation (which has not occurred here), the impairment process is not the best way to address such difficulties.

<sup>21</sup> See, e.g., WorldNet Comments at 5-6, Exhibit A.

be particularly improper for the Commission to rely upon those comments now, in its consideration of the Rico Board's waiver petition.<sup>22</sup>

The bulk of WorldNet's filing consist of the brief that it filed before the Puerto Rico Board during the Board's enterprise switching impairment inquiry.<sup>23</sup> This brief contains a litany of unproven allegations about PRT's conduct, most of which are wholly outside the bounds of the limited question of whether impairment exists in enterprise switching. Moreover, this brief is merely one of the filings that the Puerto Rico Board received during its proceeding, which also included briefs from PRT and factual submissions from several other telecommunications carriers doing business in Puerto Rico.

In any event, WorldNet's comments are without merit. First, contrary to WorldNet's claims, the fact that the Board has not established "comprehensive performance standards" for PRT's provision of services to CLECs does not create a "significant operational barrier[]" in the enterprise switching market.<sup>24</sup> Indeed, even though such standards are virtually non-existent in areas served by non-RBOCs, such as PRT, the Commission found no impairment throughout the nation, including those jurisdictions without such standards.

Second, WorldNet asserts that there are "economic barriers to switch deployment" in the enterprise markets in Puerto Rico.<sup>25</sup> Not only are WorldNet's filings bereft of any factual support for those claims — there is no attempt to quantify either costs or revenue possibilities — but the Puerto Rico Board rejected WorldNet's claims, finding that "the record evidence [was]

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<sup>22</sup> See PRT Comments at 3.

<sup>23</sup> WorldNet Comments, Exhibit A.

<sup>24</sup> WorldNet Comments at 5.

<sup>25</sup> WorldNet Comments at 5.

incomplete [with respect] to economic barriers.”<sup>26</sup> Moreover, WorldNet makes no attempt to explain how there can be “economic barriers to switch deployment” when another carrier has in fact deployed four switches in Puerto Rico which it is using to serve thousands of enterprise customers.<sup>27</sup> Standing alone, the fact that Centennial has deployed these switches and continues to invest in its facilities demonstrates that there is no economic impairment in Puerto Rico.

## **V. Conclusion**

For the foregoing reasons, and those set forth in PRT’s comments, the Puerto Rico Board’s Petition seeking waiver of the Commission’s national finding of no impairment for enterprise switching as applied to Puerto Rico should be denied.

RESPECTFULLY SUBMITTED,

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<sup>26</sup> Petition at 26.

<sup>27</sup> PRT Comments at 8.